No. 14559

In the United States Court of Appeals for the Ninth Circuit

EMIL USIBELLI AND ROSE P. USIBELLI, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
LEE A. JACKSON,
ROBERT B. ROSS,
Special Assistants to the Attorney General.

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OPINION BELOW

The memorandum opinion of the Tax Court (R. 43-47) is not officially reported.

JURISDICTION

This petition for review involves deficiency in income taxes for the calendar year 1947, for Emil Usibelli in the amount of $1,476,69, additions to tax of $132.91, and $88.60 for failure to file; and for Emil Usibelli and Rose P. Usibelli for the calendar year 1948, a deficiency in income tax of $5,648.24, both as determined by the Tax Court in its decisions filed on July 6, 1954. (R. 38, 49.) The notice of deficiency

was mailed to taxpayers on December 19, 1952. (R. 8, 18.) Within the prescribed one hundred fifty-day period, on April 13, 1953, taxpayers filed petitions for redetermination with the Tax Court (R. 3-11, 13-21), under the provisions of Section 272 of the Internal Revenue Code of 1939. The decisions of the Tax Court sustaining the Commissioner's deficiency determination with respect to the issue raised on review were entered on July 6, 1954. (R. 48, 49.) The case is brought to this Court by a petition for review filed by the taxpayers on September 22, 1954 (R. 49-53), jurisdiction being conferred herein by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether taxpayers are entitled to a deduction for percentage depletion under Section 23(m) of the Internal Revenue Code of 1939 in connection with certain Alaskan coal mining operations.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

* * * * *

(m) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; * * *

* * * * *

(26 U. S. C. ed., Sec. 23.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

(b) *Basis for Depletion.*—

* * * * *

(4) [as amended by Sec. 145, Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 124, Revenue Act of 1943, c. 63, 58 Stat. 21] *Percentage Depletion for Coal* * * *

(A) *In General.*—The allowance for depletion under section 23(m) shall be, in the case of coal mines, 5 per centum, * * * of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, * * *

(B) *Definition of Gross Income From the Property.*—As used in this paragraph the term "gross income from the property" means the gross income from mining. The term "mining", as used herein, shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products. The term "ordinary treatment processes", as used herein, shall include the following: (i) In the case of coal—clean-

ing, breaking, sizing, and loading for shipment; * * *

(26 U. S. C. 1952 ed., Sec. 114.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(m)-1. DEPLETION OF MINES, OIL AND GAS WELLS, OTHER NATURAL DEPOSITS, AND TIMBER; DEPRECIATION OF IMPROVEMENTS.—Section 23(m) provides that there shall be allowed as a deduction in computing net income in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements. Section 114 prescribes the bases upon which depreciation and depletion are to be allowed.

Under such provisions, the owner of an economic interest in mineral deposits or standing timber is allowed annual depletion deductions. An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the severance and sale of the mineral or timber, to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from production. Thus, an agreement between the owner of an economic interest and another entitling the latter to purchase the product upon

production or to share in the net income derived from the interest of such owner does not convey a depletable economic interest.

* * * * *

STATEMENT

The pertinent facts herein may be summarized as follows:

The taxpayers are husband and wife.[1] They filed a joint return for 1948 and Emil filed a separate return for 1947 with the Collector of Internal Revenue for the District of Washington. (R. 43.)

Emil was engaged in coal mining operations in Alaska during the taxable years. The Secretary of the Interior of the United States granted special permission to the United States Army on April 5, 1946, to mine coal from specified Government land in Alaska. The permit provided that the Army might contract for the mining of coal for its own use by private parties. The mining here in question was done under the permit and extensions thereof. (R. 43-44.)

The Army entered into a contract with Emil, who had filed a satisfactory bond. The contract was dated July 1, 1946, and was to expire on June 30, 1947. It provided that Emil was to furnish and deliver coal for Ladd Field, Alaska, from the mine at Suntrana, Alaska. The coal was to consist of 40,000 tons of mine run and 30,000 tons of lump nut. Emil was to place the coal on railroad cars at the mine, screened and graded. A minimum of 5,600 tons was to be delivered each month. The total amount to be paid Emil was $362,500, com-

[1] Hereafter, the singular "taxpayer" is often used to refer to both Mr. and Mrs. Usibelli, where the distinction is unimportant.

puted at $4.75 per ton of mine run and $5.75 per ton of lump nut. The contract provided that it could be terminated by the Government in whole, or from time to time in part, whenever the contracting officer should determine that such action would be for the best interests of the Government and it provided how settlement would be made in case of termination. The Government could terminate the contract or reduce the specified quantities to be delivered if its requirements should change. The provisions of Article 19 entitled "Price Adjustments" were as follows (R. 44-45):

> In the event that during the contract period changes should occur in working hours, wage scales, operating expense, or other conditions of employment which changes are a part of the general revision of such conditions within the producing district where the coal is mined, the parties hereto, upon the request in writing of one to the other within thirty (30) days after the effective date upon which any such change occurs, may redetermine by negotiation the unit price affected, provided that pending such negotiations the contractor shall continue deliveries hereunder. Any price redetermined as herein provided shall be applicable to all deliveries after the effective date upon which the change occurs permitting redetermination as herein provided.

Emil applied for and was granted an increase to $5.47 per ton for mine run in September 1946 and the contract amount was correspondingly increased. The contract was changed in May 1947 to provide that all coal delivered should be mine run and to extend the

delivery date to September 30, 1947, later extended to December 31, 1947, due to curtailing of deliveries by the Army. (R. 45.)

Emil was invited to bid on the furnishing of coal to the Army for the fiscal year 1948. He submitted a bid on May 15, 1947, and was advised on May 19, 1947, that the Army intended to contract with him to furnish 70,000 tons during the period July 1, 1947, to June 30, 1948, as soon as funds were available. (R. 45.)

The President of the United States proclaimed cessation of hostilities on December 31, 1946. The Army permit to mine the coal would have expired as a result on June 30, 1947, but it was extended to December 31, 1947, and later to the effective date of a lease which might be issued for the lands. Emil had applied for a lease of the lands on May 21, 1947. A lease was granted to Emil in 1949. (R. 45-46.)

The Government, on August 25, 1947, ordered 45,000 tons of mine run, 25,000 tons of lump nut and 30,000 tons of steam and stoker coal to be delivered by Emil, pending the execution of a definite contract. The Army and Emil entered into a new contract dated July 1, 1947, covering the coal ordered on August 25, 1947, to be delivered between July 1, 1947, and June 30, 1948. The amount to be paid Emil was $577,000, computed at $5.22 per ton of mine run and $6.22, per ton for the other grades. The other provisions of the contract were substantially the same as those in the earlier contract. The performance time was later extended to July 31, 1948. (R. 46.)

Emil conducted mining operations under the contracts and the order during the taxable years. The Commissioner disallowed claimed depletion deductions

of $5.596.54 for 1947 and $8,026.71 for 1948 with the explanation that Emil had no economic interest in the coal in place that he was mining for the United States Army. The Tax Court sustained the Commissioner of Internal Revenue and this appeal resulted. (R. 46.)

SUMMARY OF ARGUMENT

Under the cases and Section 29.23(m)-1 of the Regulations, an owner of an economic interest in mineral deposits is allowed annual depletion deductions. In *Burton-Sutton* this interest was said to be the possibility of profit from the use of rights over production dependent solely upon the extraction and sale of the mineral. Here, the taxpayers did not acquire economic interests in the coal under the contract with the Army because the coal belonged at all times to the United States Government. Under the statute the Secretary of the Interior has authority to grant leases to unreserved coal lands in Alaska but taxpayer did not receive his lease until 1949, after the taxable periods here involved. Emil was merely employed on an annual basis to mine and load the coal for use by the Army. The coal was never sold. Emil was paid an agreed amount for the work which he performed. His payments depended upon mining costs rather than upon any sales or market prices. Recovery of his unamortized investment costs could be had from the successful bidder at a contemplated public auction. He could mine only limited quantities of coal and the amount could be reduced by the Government. Furthermore, the contracts could be terminated by the Government whenever the contracting officer determined that such action was in the best interests of the Government.

Thus, the decision of the Tax Court herein is correct and should be affirmed.

ARGUMENT

The Tax Court Correctly Held That Taxpayers Herein Are Not Entitled to a Deduction for Percentage Depletion in Connection with Certain Alaskan Coal Mining Operations

A. *A depletion allowance of 5 per cent is allowed on the gross income from coal property*

The provisions of the 1939 Internal Revenue Code and of the Regulations issued thereunder which are pertinent to this proceeding can be briefly summarized as follows: Section 23(m) of the Internal Revenue Code, *supra,* provides that there shall be allowed as a deduction in computing net income in the case of mines, a reasonable allowance for depletion. Section 114(b)(4) of the Code, *supra,* enlarges on this by providing specifically that percentage depletion for coal mines shall be 5 per centum "of the gross income from the property * * *, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer."

Section 29.23(m)-1 of Treasury Regulations 111, promulgated under the Internal Revenue Code, *supra,* provides that the owner of an economic interest in mineral deposits is allowed annual depletion deductions, and defines "economic interest" by stating that such an interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place and secures, by any form of legal relationship, income derived from the severance and sale of the mineral, to which he must look for a return of his capital.

B. *An owner of an economic interest in a mineral property is entitled to his equitable proportion of the 5 per cent depletion allowance*

The issue in this case is simply whether taxpayer is entitled to a percentage depletion allowance on the payments made by the Army to him at varying specified rates per ton mined.[2] The theory underlying the deduction for depletion was explained in *Kirby Petroleum Co.* v. *Commissioner,* 326 U.S. 599, 602-603, as follows:

> The present provisions for depletion allowances have been worked out so as to give the holder of an economic interest in the oil or other natural resource an allowance for depletion. While there are income incidents to the utilization of natural resources, there is also an obvious exhaustion of the capital used to produce the income. In theory the aggregate sum allowed for depletion would equal the value of the natural resource at the time of its acquisition by the taxpayer, so that at the exhaustion of the resource the taxpayer would have recovered through depletion exactly his investment. The administrative difficulties in taxation

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[2] From July 1, 1946, to June 30, 1947, the coal was to consist of 40,000 tons of mine run at $4.75 per ton and 30,000 tons of lump nut at $5.75 per ton, total price being $362,500. (R. 44.) In September, 1946, the price for mine run was increased to $5.47 per ton. (R. 45.) On August 25, 1947, the Army ordered 45,000 tons of mine run, and 25,000 tons of lump nut and 30,000 tons of steam and stoker coal. A contract was subsequently executed, back-dated to July 1. 1947, covering the coal to be delivered in the 1948 fiscal year. The total amount was $577,000, computed at $5.22 per ton of mine run and $6.22 per ton for the other grades. (R. 46.)

> of oil and gas production in view of the uncertainties of quantities and time of acquisition, that is at the purchase of the property or at the discovery of oil or gas, finally have brought Congress to the arbitrary allowance of 27½ per cent now embodied in §114(b)(3). Thus, the 27½ per cent is appropriated by the statute to the restoration of the taxpayer's capital and the rest of the proceeds of the natural asset becomes gross income. *Anderson* v. *Helvering,* 310 U.S. 404, 407-8. It follows from this theory that only a taxpayer with an economic interest in the asset, * * * [here, the coal], is entitled to the depletion. *Palmer* v. *Bender,* 287 U.S. 551, 557; *Thomas* v. *Perkins,* 301 U.S. 655, 659.

Because only a taxpayer with an economic interest is entitled to percentage depletion (*Commissioner* v. *Southwest Exploration Co.,* decided by this Court on March 7, 1955), the question in each case where such allowance is claimed is: Does the taxpayer have an economic interest in mineral property producing the income, which interest is necessarily exhausted as the mineral is extracted?

C. *Taxpayer did not receive an economic interest under the terms of the particular contract by which he was hired by the Army to mine coal at a specified rate per ton on Government land*

It is well settled that an economic interest in a mineral property does not mean title to, or ownership of, the mineral deposit. *Lynch* v. *Allworth-Stephens Co.,* 267 U.S. 364; *Burnet* v. *Harmel,* 287 U.S. 103; *Kirby Petroleum Co.* v. *Commissioner,* 326 U.S. 599, 602. As

the Supreme Court has said, the statute extends to (*Palmer* v. *Bender,* 287 U.S. 551, 557)—

> every case in which the taxpayer has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital.

In the Court's most recent decision dealing with depletion, *Burton-Sutton Oil Co.* v. *Commissioner,* 328 U.S. 25, it has further clarified the nature of an economic interest in a mineral property. It has stated that what marks such an interest in a taxpayer is the (pp. 34-35)—

> "possibility of profit" from the use of his rights over production, "dependent solely upon the extraction and *sale* of the oil," [Italics supplied.]

As the Court points out in the *Burton-Sutton* case, it has not been deemed significant from the federal tax viewpoint what the instrument creating the rights is. (P. 32.) It is also "unimportant" what the cost of such rights were to the taxpayer. (P. 34.) To have an economic interest the taxpayer must possess "valuable benefits arising from and dependent upon the extraction of the oil [or coal]" as consideration for granting to him "control over the exploitation of the land." (P. 33.)

In this case, the possession of the right by the taxpayer to receive a specified dollar amount per ton of coal mined for the Army on Government land (managed by the Department of Interior) does not qualify as the ownership of a depletable economic interest in the mineral in place. *Helvering* v. *Bankline Oil Co.,*

303 U.S. 362; cf. *Commissioner* v. *Gregory Run Coal Co.,* 212 F. 2d 52 (C.A. 4th), certiorari denied, 348 U.S. 828.[3] Taxpayer's remuneration herein is not "dependent solely upon the extraction and *sale*" of the coal. Rather taxpayer is being compensated for labor performed in relation to a mineral which the Government already owns, albeit in the ground. Taxpayer is not sharing in the market risks of a rise or fall of the ultimate sales price. *Ruston* v. *Commissioner,* 19 T.C. 284. *Brown* v. *Commissioner,* 22 T.C. 58. At most, taxpayer is a hireling bound to do the Army's bidding within the terms of the contract.

The application to strip miners of the general depletion principles, laid down by the Supreme Court, has been a troublesome problem. In G.C.M. 26290, 1950-1 Cum. Bull. 42, the Internal Revenue Service has attempted to lay down certain guides as to whether strip mining contractors come within these general principles. The Tax Court has generally approved these tests. *Ruston* v. *Commissioner, supra.* G.C.M. 26290 provides (p. 45) that a stripping contractor is entitled to a depletion allowance only where he "obtains a capital interest in the mineral in place and must look to the severance and sale of the mineral for the return of his capital consumed in that process." If the contract may be cancelled either at will or with nominal notice by the coal company [*i.e.* here the Army], there is no capital or depletable economic interest in the stripping contractor.

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[3] We believe that *Morrisdale Coal Mining Co.* v. *Commissioner,* 19 T.C. 208 (pending on appeal, C.A. 3d); *Mammoth Coal Co.* v. *Commissioner,* 22 T.C. 571 (pending on appeal, C.A. 3d), are distinguishable on their facts.

Article 8a of the contract between the Army and the taxpayer (Ex. 3-C, Appendix, *infra*),[4] by its specific terms provides that "performance of work under this contract may be terminated by the Government in accordance with this Article in whole, or from time to time in part, whenever the contracting officer shall determine any such termination is for the best interests of the Government." Contrary to taxpayer's implication (Br. 10), the subsequent provisions in Article 8 do not limit the right of the Army to terminate the contract but allows the contracting officer to exercise the option whenever he believes such termination to be for the best interests of the Government. The later provisions of Article 8 merely specify the procedures to be followed in accomplishing the termination. Even a termination occurring at the time of a general termination is to be in accord with the provisions of Article 8 unless the taxpayer "is then in gross or wilful default under" the contract, in which case it can be assumed he will have forfeited any rights previously held under the contract. Article 8, considered in the light of G.C.M. 26290, dramatically highlights the lack of merit in taxpayer's contention that he had a capital interest in coal that was owned continuously by the Government.[5] *Morrisdale Coal Mining Co.* v. *Commissioner, supra,* p. 216.

Article 18 (Ex. 3-C, Appendix, *infra*), provides for (1) the termination of the contract; (2) the reduction without liability of the quantities of coal to be received

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[4] The second contract (Ex. 14-N) is not set forth inasmuch as its pertinent provisions are similar to those of Ex. 3-C.

[5] Taxpayer has not, indeed he cannot, point to any transaction by which he obtained title to any coal during the fiscal years here involved.

by the Government; or (3) the directing of shipment to other destinations, in the event certain contingencies occur. Being thus subject to the control of the Army as to the quantity of coal to be mined, it cannot be contended that taxpayer had the requisite "control over the exploitation of the land." See *Burton-Sutton,* p. 33.

Even assuming *arguendo,* that this contract is not terminable at will, taxpayer still does not have an economic interest here since he is not dependant upon the actual mineral itself, or the proceeds of the sale thereof, for his remuneration for his labor. *Anderson* v. *Helvering,* 310 U.S. 404. Rather, taxpayer can look to the general credit of the United States Government for payment. Furthermore, taxpayer has an additional source available for the recovery of his capital investment. A public auction of this self-same land for lease was contemplated. (Ex. 11-K, R. 36-38.) If and when the lease was granted, the successful bidder (if not the taxpayer) was to have been required to repay taxpayer for his capital then invested in the subject mineral property. In reality, taxpayer was thus not restricted, in the recovery of any remaining investment in the mining operation, to the mineral itself or the proceeds thereof—a prerequisite to the possession of an economic interest under the decisions. See *supra.*

The Secretary of the Interior has authority to grant leases to unreserved Alaskan coal lands and coal deposits. 48 U.S.C. 1952 ed., Sec. 434. In the instant case, no lease was issued to taxpayer by the Secretary until 1949. However, the Secretary did grant a permit to the Army to have the subject coal mined for its own

use by private parties. (Ex. P, R. 39-40, 44) There has been no suggestion here that this permit was ever assigned. Rather, under the authority of the permit from the Secretary of the Interior the Army granted limited one-year permits in its own name to the taxpayer to mine coal for its (the Army's) own use. In substance the taxpayer had a contractual relationship with the Army, but no real control over production. Briefly, the taxpayer lacked an economic interest herein because: (1) the subject contracts were for very limited periods of time—one year; (2) the Army had the power of termination at will; (3) recovery of capital by taxpayer could be accomplished from a source other than the mineral itself or the proceeds from the sale thereof; (4) the coal actually produced was the property of the Government at all times and hence not available for sale by the taxpayer.

As we understand taxpayer's argument, he is contending (1) that the contracts involved herein are not terminable at will (Br. 9-10) and (2) that taxpayer sold the coal herein to the Army (Br. 16-19). We have discussed the fallacy of number 1, *supra*. Taxpayer's second contention is equally without merit. At no point in this proceeding has taxpayer produced a purchase agreement, bill of sale, or other document by which either title or any equitable interest to the subject coal herein was transferred from the Government to taxpayer.[6] Absent title and equitable interest in taxpayer, it is impossible for him to claim a sale to the Army, of

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[6] The fact that certain "boiler-plate" provisions were ineptly lifted *in toto* from standard government purchase contracts for use in hiring Emil is insufficient to put title to the coal in his hands at any time.

coal which is already owned by the United States Government.

The Tax Court succinctly summarized this case as follows (R. 46-47):

> The coal belonged at all times to the United States Government. Emil was merely employed on an annual basis to mine and load the coal for use by the Army. The coal was never sold. Emil was paid an agreed amount for the work which he performed. The record does not show that his payments depended upon any sales or market prices of the coal but indicates that they depended upon mining costs. The fact that Emil was applying for a lease is immaterial since he was not a lessee during the taxable years. He could mine only limited quantities of coal and the amount could be reduced by the Government. The contracts could be terminated by the Government under certain circumstances.

CONCLUSION

The decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
LEE A. JACKSON,
ROBERT B. ROSS,
Special Assistants to the Attorney General.

MARCH, 1955

APPENDIX

Excerpts from Exhibit No. 3-C

Headquarters Alaskan Department
Office of the Quartermaster
APO 942, % Postmaster, Seattle, Washington

Contract No. W 7500 qm-24
O. I. No. C-47-2

Supply Contract
War Department

Contractor & Address: Emil Usibelli, Suntrana, Healy Forks, Alaska.

Contract for: Coal for Ladd Field, Alaska.

Amount: $362,500.00.

Location: Mine located at Suntrana, Alaska.

Payment: To be made by Finance Officer, Ladd Field, Alaska.

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to the following allotment, the available balance of which is sufficient to cover the cost of the same: 2170905 793-9 ESA P439-08 S501-009.

This contract is authorized by and entered into under Public 703, 76th Congress, approved 2 July 1940, the First War Powers Act, 1941, and Executive Order No. 9001 (27 December 1941).

Contract for Supplies

This Contract, entered into this *1st day of July 1946,* by the United States of America (hereinafter

called the Government) represented by the Contracting Officer executing this contract, and an Individual trading as EMIL USIBELLI of Healy, in the Territory of Alaska (hereinafter called the Contractor), witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. Scope of this Contract—The Contractor shall furnish and deliver Coal in the quantities and at the prices specified in Schedule of Supplies, part hereof, for the consideration stated, $362,500.00, in strict accordance with the Schedule of Supplies which is made a part hereof and designated as follows: Schedule of Supplies.

* * * * *

ARTICLE 8. Termination at the Option of the Government—

a. The performance of work under this contract may be terminated by the Government in accordance with this Article in whole, or from time to time in part, whenever the contracting officer shall determine any such termination is for the best interests of the Government. Termination of work hereunder shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract shall be terminated, and the date upon which such termination shall become effective. If termination of work under this contract is simultaneous with, a part of, or in connection with, a general termination (1) of all or substantially all of a group or class of contracts made by the War Department for the same product or for closely related products, or (2) of war contracts at, about the time of, or

following, the cessation of the present hostilities, or any major part thereof, such termination shall only be made in accordance with the provisions of this Article, unless the contracting officer finds that the contractor is then in gross or wilful default under this contract.

b. After receipt of a Notice of Termination and except as otherwise directed by the contracting officer, the contractor shall (1) terminate work under the contract on the date and to the extent specified in the Notice of Termination; (2) place no further orders or subcontracts for materials, services, or facilities except as may be necessary for completion of such portions of the work under the contract as may not be terminated; (3) terminate all orders and subcontracts to the extent that they relate to the performance of any work terminated by the Notice of Termination; (4) assign to the Government, in the manner and to the extent directed by the contracting officer, all of the right, title and interest of the contractor under the orders or subcontracts so terminated; (5) settle all claims arising out of such termination of orders and subcontracts with the approval or ratification of the contracting officer to the extent that he may require, which approval or ratification shall be final for all the purposes of this Article; (6) tranfer title and deliver to the Government in the manner, to the extent and at the times directed by the contracting officer (i) the fabricated or unfabricated parts, work in process, completed work, supplies and other material produced as a part of, or acquired in respect of the performance of, the work terminated in the Notice of Termination, and (ii) the plans, drawings, information and other property which, if the contract had

been completed, would be required to be furnished to the Government; (7) use his best efforts to sell in the manner, to the extent, at the time, and at the price or prices directed or authorized by the contracting officer, any property of the types referred to in subdivision (6) of this paragraph provided, however, that the contractor (i) shall not be required to extend credit to any purchaser and (ii) may retain any such property at a price or prices approved by the contracting officer; (8) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and (9) take such action as may be necessary or as the contracting officer may direct for protection and preservation of the property, which is in the possession of the contractor and in which the Government has or may acquire an interest.

c. The Contractor and the contracting officer may agree upon the whole or any part of the amount or amounts to be paid to the contractor by reason of the total or partial termination of work pursuant to this Article, which amount or amounts may include a reasonable allowance for profit, and the Government shall pay the agreed amount or amounts. Nothing in paragraph (d) of this Article prescribing the amount paid to the contractor in the event of failure of the contractor and the contracting officer to agree upon the whole amount to be paid to the contractor by reason of the termination of work pursuant to this Article shall be deemed to limit, restrict or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the contractor pursuant to this paragraph (c).

d. In the event of the failure of the contractor and contracting officer to agree as provided in paragraph c

upon the whole amount to be paid to the contractor by reason of the termination of work pursuant to this Article, the Government, but without duplication of any amounts agreed upon in accordance with paragraph c, shall pay to the contractor the following amounts:

(1) For completed articles delivered to and accepted by the Government (or sold or retained as provided in paragraph b (7) above) and not theretofore paid for, forthwith a sum equivalent to the aggregate price for such articles computed in accordance with the price or prices specified in the contract;

(2) In respect of the contract work terminated as permitted by this Article, the total (without duplication of any items) of (i) the cost of such work exclusive of any cost attributable to articles paid or to be paid for under paragraph d (1) hereof; (ii) the cost of settling and paying claims arising out of the termination of work under subcontracts or orders as provided in paragraph b (5) above, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor prior to the effective date of the notice of termination of work under this contract which amounts shall be included in the cost on account of which payment is made under subdivision (i) above; and (iii) a sum equal to two per cent of the part of the amount determined under subdivision (i) which represents the cost of articles or material not processed by the contractor, plus a sum equal to six per cent of the remainder of such amount, but the aggregate of such sums shall not exceed six per cent of the whole of the amount determined under subdivision (i), which for

the purpose of this subdivision (iii) shall exclude any charges for interest on borrowings:

(3) The reasonable cost of the preservation and protection of property incurred pursuant to paragraph b (9) hereof; and any other reasonable cost incidental to termination of work under this contract, including expense incidental to the determination of the amount due to the contractor as the result of the termination of work under this contract.

The total sum to be paid to the contractor under subdivisions (1) and (2) of this paragraph d shall not exceed the total contract price reduced by the amount of payments otherwise made and by the contract price of work not terminated. Except for normal spoilage and to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the contractor as provided in paragraph d (1) and paragraph d (2) (i), all amounts allocable to or payable in respect of property, which is destroyed, lost, stolen, or damaged so as to become undeliverable prior to the transfer of title to the Government or to a buyer pursuant to paragraph b (7) or prior to the 60th day after delivery to the Government of an inventory covering such property, whichever shall first occur.

e. The obligation of the Government to make any payments under this article: (1) shall be subject to deductions in respect of (i) all unliquidated partial or progress payments, payments on account theretofore made to the contractor and unliquidated advance payments, (ii) any claim which the Government may have against the contractor in connection with this contract, and (iii) the price agreed upon or the proceeds of sale

of any materials, supplies or other things retained by the contractor or sold, and not otherwise recovered by or credited to the Government, and (2) in the discretion of the contracting officer shall be subject to deduction in respect of the amount of any claim of any subcontractor or supplier whose subcontract or order shall have been terminated as provided in paragraph b (3) except to the extent that such claim covers (i) property or materials delivered to the contractor or (ii) services furnished to the contractor in connection with the production of completed articles under this contract.

f. In the event that, prior to the determination of the final amount to be paid to the contractor as in this article provided, the contractor shall file with the contracting officer a request in writing that an equitable adjustment should be made in the price or prices specified in the contract for the work not terminated by the Notice of Termination, the appropriate fair and reasonable adjustment shall be made in such price or prices.

g. The Government shall make partial payments and payments on account, from time to time, of the amount to which the contractor shall be entitled under this Article, whether determined by agreement or otherwise, whenever in the opinion of the contracting officer the aggregate of such payments shall be within the amount to which the contractor will be entitled hereunder.

h. For the purposes of paragraphs d(2) and d(3) hereof, the amounts of the payments to be made by the Government to the contractor shall be determined in accordance with the statement of Principles for Determination of Costs upon Termination of Government Fixed Price Supply Contracts approved by the Joint Contract Termination Board, December 31, 1943, as

amended by Regulation No. 5 of the Office of Contract Settlement, dated September 30, 1944. The contractor for a period of three years after final settlement under the contract shall make available to the Government at all reasonable times at the office of the contractor all of its books, records, documents, and other evidence bearing on the costs and expenses of the contractor under the contract and in respect of the termination of work thereunder.

* * * * *

ARTICLE 18. Variation from Quantity Specified—

a. The quantities of each item specified are based on present requirements, and it is expressly agreed that should the consuming point be abandoned or the consumption thereat be reduced or burning equipment be altered, or should the Government desire to reload and ship excess of surplus from storage at other Army installations to the consuming point or points herein named, the Government upon notices to the contractor given in writing, reserves the right to (1) terminate the contract, (2) reduce correspondingly the quantities to be furnished hereunder without liability to the Government other than to pay the contract price for all coal delivered, or (3) direct the shipment of coal contracted for hereunder to other destinations as provided elsewhere herein.

b. In the event of such decrease in quantities to be furnished hereunder, any coal actually loaded and quantities en route prior to receipt of such notice by the contractor shall be accepted if they conform in all respect to the contract provisions.

c. In performing this contract the quantities specified shall not be exceeded except by such quantities as may be necessary to make final shipments a full carload.

* * * * *

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA
By BENARD PETERS, CAPT. CE
Purchasing and Contracting Officer.
EMIL USIBELLI.

Two Witnesses:

LOIS L. GAY,
P. O. Box 2017, Fairbanks, Alaska.
G. A. GUSTAFSON,
P. O. Box 1370, Fairbanks, Alaska.

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